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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1933.

MISSISSIPPI VALLEY BARGE LINE COMPANY, a Corporation,
Appellant (Petitioner),

vs.

THE UNITED STATES OF AMERICA and THE INTERSTATE COMMERCE COMMISSION,
Appellees (Defendants),

and

ILLINOIS CENTRAL RAILROAD COMPANY, LOUISVILLE AND NASHVILLE RAILROAD COMPANY, SOUTHERN RAILWAY COMPANY, CINCINNATI, NEW ORLEANS AND TEXAS PACIFIC RAILWAY COMPANY, THE ALABAMA GREAT SOUTHERN RAILROAD COMPANY and NEW ORLEANS AND NORTHEASTERN RAILROAD COMPANY,
Appellees (Interveners).

No. 807.

Appeal from the District Court of the United States for Eastern Division of Eastern Judicial District of Missouri.

REPLY BRIEF OF APPELLANT.

This reply brief is filed under authority of this Court granted on April 6, 1934, and by reason of the fact that briefs of appellees (defendants) and appellees (interveners), were not received until immediately prior to the argument before this Court.

I.

Appellant is not contending that rail lines do not have the right to initiate rail rates, but is contending that when said rates are brought into an investigation by an order of the Interstate Commerce Commission then that the Commission, in passing upon said rates, must give consideration to mandates which were enacted to control the deliberations and decisions of the Commission.

II.

Appellant is not contending that this Court has the function or right to determine the character of rates which the Commission should have prescribed, but is simply asking that, by reason of the matters presented by appellant that the present orders of the Interstate Commerce Commission should be annulled.

III.

The orders of the Commission primarily involved in this proceeding are those authorizing rates on refined sugar, carload, 80,000-pound minimum, from Gulf ports to destinations in Missouri, Illinois and contiguous territory. The rates which the rail lines proposed for application were not approved, but the Commission in its order authorized the rail lines to establish in lieu of the rates contained in the schedules filed by the rail lines, the rates approved in the report referred to and, upon notice to the Commis-

sion and the general public, by not less than five days filing and posting, but not earlier than July 29, 1933 (R. 68). It is alone by virtue and authority of this order that the rates now charged by the rail lines are in effect. This order was affirmative in character and is the sole and only justification for the rail lines now charging the rates here complained of. This answers the contention of the appellees that the going rates are voluntary in character. The rail lines could not have prescribed any other rates than those authorized by the Commission without filing new schedules and could not have put these rates into effect on July 29, 1933.

IV.

The Commission found that the rail carriers were seeking drastic and sweeping reductions in rates, and intended to go even lower if proposed rates were not sufficiently effective; that no reductions were proposed in the barge-rail rates from Louisiana points to destination (which is significant because it shows that the all-rail rates alone were to be reduced); that the proposed rates to water competitive points and also interior points were generally lower than the water-truck combination; that the usual water-truck rates to points north and south of the Ohio River were from 5 to 15 cents higher than the proposed all-rail rates; that the proposed rates would stop a large part of the distribution of water-borne sugar, and dry up much of the water movement; that the proposed rates to

competitive points, such as Chicago, were made solely with regard to water competition, but that the rates were to be blanketed back towards origin (the rates to St. Louis authorized by the Commission will blanket back to 300 miles north of Mobile or New Orleans); that sugar traffic, in its present volume, is almost vital to the existence of the barge lines, and constitutes but a small part of the traffic of rail lines, and that if respondents succeed the barge lines will be dealt a staggering blow. These particular findings are specifically referred to with record reference on pages 8 to 12 of appellant's original brief.

From these statements, we have definite and positive findings by the Commission of the exact effect that the proposed rates of the rail lines would produce. The going rail rate from New Orleans to Chicago was 56 cents. The rail lines propose a reduction in this rate of 26 cents. The Commission authorized a rate which resulted in a reduction of 22 cents. The rail lines propose a reduction of 24 cents in the 52-cent rail rate from New Orleans to St. Louis; the Commission authorized a reduction of 20 cents and the rates to other destinations proposed and authorized are in approximately the same relative amount. Therefore, the particular findings of the Commission with reference to the rates proposed are modified only in a very slight degree. To apply this to a specific finding of the Commission above referred to, the water-truck rates to interior points north and south of the Ohio River are from 1 to 11 cents higher than the rate authorized by the Commission for all-rail application.

The first finding above referred to is significant in this connection. The Commission states that the purpose of the rail lines is to seek drastic, sweeping and quick reduction in rates. The rail lines sought a decrease in the rail rates of approximately 46 per cent. They secured reduction in rates of approximately 40 per cent. This clearly indicates the exact extent of the rail lines' success in the proceeding before the Interstate Commerce Commission.

Out of the total tonnage moved by rail and barge lines, 95 per cent is moved alone by rail carriers. Of the remaining 5 per cent, sugar is a commodity which is available for barge line transportation, and this is the commodity involved in this proceeding. This particular commodity constitutes an insignificant portion of the total tonnage of rail lines (R. 46). It constitutes approximately one-third of the total volume of the appellant's traffic and 50 per cent of the total volume of the Federal Barge Line. The Commission's exact finding is that the proposed rates will wipe out the entire showing of net revenue of the Federal Barge Line and, if there is a reduced volume, it will cost it much more (R. 46). This clearly indicates the very positive and detrimental effect that the authorized as well as the proposed rates will have upon a privately owned enterprise such as is conducted by this appellant.

We, therefore, respectfully urge upon this Court that, taking each finding and taking said findings collectively as they were made, it is positive that the rates authorized will have a disastrous effect upon barge line operation.

A suggestion was made as to what the Commission exactly intended in its statement "If respondents succeed, the barge lines will be dealt a staggering blow" (R. 46). We quote the reading:

> "Protestanf urges that respondents have conspired in restraint of trade and in violation of the antitrust law to monopolize the traffic. If respondents succeed, the barge lines will be dealt a staggering blow. Protestant suggests that respondents can much better afford to forego this traffic than can the barge lines" (R. 46).

In this reading the Commission uses the term "protestant" in connection with the first and third sentences. If the Commission intended that the second sentence was a mere statement of protestant's contention it is apparent, giving consideration to the reading of the first and third sentences, that the Commission would have used the term "protestant" in connection with the second sentence. By reason of the fact that the Commission has not used the term "protestant," we respectfully and sincerely urge that, according to the exact reading and punctuation, this particular sentence must be construed as a finding of the Commission. The other findings of the Commission are to the same effect and all should be construed together.

V.

Appellees' briefs are addressed primarily to the proposition of "the extreme care" that the Commission took

to determine these rates. This contention of appellees, we suggest, is exactly refuted by the findings of the Commission above referred to. The appellees base their contention upon, and call particular attention to, the rates which the Commission mentions of so-called contract barge operators. These particular rates under the Commission's finding are not satisfactory or customarily used by shippers. The service is not regular or dependable and the operators are financially irresponsible. This particular service carries less than one-tenth of the total tonnage of sugar moved by barge operators, and it is, therefore, apparent that these are not the rates which should be considered by anyone in order to justify or attempt to justify rates for rail applications. If the rates referred to in appellees-interveners' brief, which were quoted for contract barge service (a tow service alone from port to port), had been employed by certificated barge lines, or if this service had moved any considerable portion of the tonnage moving by river service, there would possibly have been some justification for these rates being considered and relative rates based thereon, but under the exact findings of the Commission this is not the situation. The Commission finds that the certificated barge lines moved nine-tenths of the total water-borne tonnage of sugar moving northbound from the origins involved and to the destinations considered. These rates when employed by contract barge operators affect the certificated barge lines as much or more than they do the rail lines, but the rail lines were not at-

tempting in their proposal to meet the competitive rate of the barge lines, which were moving by far the major portion of this tonnage.

The Commission authorized a 34-cent rail rate to meet a competitive barge rate of 44 cents from New Orleans to Cincinnati and Louisville. It authorized a 32-cent rate to meet a competitive barge rate of 42 cents to Evansville and 39 cents to Cairo, and a 32-cent rate to meet the competitive rate of the Federal Barge line of 42 cents from New Orleans to St. Louis (R. 41).

To appreciate the full detriment to certificated barge lines of these rates authorized by the Commission to meet the competitive barge rates above indicated, the Court must give consideration to the fact that the Commission in its report recognizes the fact that barge lines cannot attract any tonnage to their service unless the barge rates are differentially lower than the all-rail rate.

VI.

The appellees also give consideration to the proposition that the Commission in the establishment of the level of the rates here involved was giving consideration to rates from the Atlantic Seaboard to Chicago. Our answer to this statement is that if the Southern Lines intended to meet the competitive situation at Chicago from the Atlantic Seaboard then they would have proposed rates to Chicago to meet this competitive situation and would have

asked for Fourth Section relief in order to maintain reasonable rates at intermediate points. This the Southern Rail Lines did not do, but have proposed rates, and the Commission has authorized rates, to interior destinations which are not directly affected by the presence of navigable streams and in nowise affected by the Chicago situation. We give consideration to this exact proposition in our original brief on pages 50 and 51 and 70 and 71. The above statement further suggests that the rail lines are not actually attempting to meet a competitive rate even at Chicago, but are attempting to reduce the rates from these Gulf ports to Chicago and all intermediate territories, with the hope and expectancy that barge operations will disappear as transportation facilities.

VII.

Appellees, in their presentation, give consideration to Section 500 of the Transportation Act. They first state that it is merely a declaration of policy and is not addressed to the Commission "any more than to any other governmental body," and that it prescribes no standard for the Commission or any other governmental body to follow, and then state that the Commission gave consideration to this enactment. This enactment is not mentioned as such in the Commission's decision. However this may be, we contend that if the result which necessarily will obtain under the Commission's exact findings and orders is that water transportation will not be promoted, encour-

aged or developed in connection with the commerce of the United States and if water transportation will not be preserved in full vigor that then you do have a definite finding which violates a positive standard which federal enactment has prescribed.

VIII.

Reference to the appendix of the brief of appellees-interveners, page 91, sets forth Section 1 of the Interstate Commerce Act. Under this particular enactment all charges to be rendered in the transportation of property must be just and reasonable and every unjust and unreasonable charge is unlawful. Under section 15 (Appendix, p. 93) it is specifically provided that under an order of investigation instituted by the Commission that the Commission is "hereby authorized and empowered to determine and prescribe what may be the just and reasonable individual or joint rate." Under section 15a (Appendix A, this brief), as amended, it is prescribed that the Commission, in the exercise of its powers to prescribe just and reasonable rates, shall given consideration to certain particular matters. These particular sections are the only sections of the Interstate Commerce Act under which the Commission in the instant proceeding was authorized to perform a function under its delegated power. It was incumbent upon the Commission to determine and fix a just and reasonable rate, and the Commission failed and makes no finding that these rates are either just or rea-

sonable. The appellees requested no finding that the rates authorized were just and reasonable, but requested the three-judge court to find that the rates were compensatory.

Under section 4 (Appellees' Appendix 91), it is provided that the Commission, in the exercise of its powers under the long-and-short-haul provision, may give consideration upon application and authorize a less charge for the longer than the shorter distance, but that, in the exercise of this authority, the Commission shall not permit the establishment of any charge to or from the more distant point that is not reasonably compensatory for the service performed. This is the only provision of the Interstate Commerce Act where the term "compensatory" is used in connection with matters relating to the subject here under discussion. The rail lines did not ask for Fourth Section relief, and, therefore, the question of a compensatory rate by virtue of a long and short haul is not involved in this proceeding, and we further contend if a compensatory rate were involved in this proceeding that the rates here authorized are not compensatory and were not so found by the Commission and have given this matter consideration page 40 to and including page 54 in our original brief. The above contention is exactly acknowledged by the appellees-interveners on page 57 of their brief where they state that rates must be just, reasonable, nondiscriminatory, nonpreferential and nonprejudicial.

IX.

Appellees' direct attention to the proposition that our contention with reference to the antitrust law is not well founded, for the reason that the prohibition of this enactment is addressed to a contract. It is possible that we have not made ourselves plain. Under the Commission's decision, and under the facts of record in this case, it is certain that rail lines by concerted action joined together and proposed certain rates. It is certain that the Commission found that these proposed rates would result in a restraint of commerce between the states and would tend to produce a monopoly in rail transportation. The Commission found that said rates would dry up much of water-borne movement and made other finding to which we have referred. Therefore, there is an exact finding that the proposed rates were in violation of the Sherman Antitrust Law. The slight increase over the proposed rates, as heretofore considered, does not change this particular finding in its effect, and if there is any possible change it would only be in degree.

X.

It is suggested that the record before the Commission is not presented to this Court, and the suggestion is made that, therefore, the conclusions and findings of the Commission are conclusive. This Court has held where the allegation is made that there was no evidence before the Com-

mission to support its finding, and the record is not presented, that the Court cannot determine these facts and that the presumption will be that the Commission acted under contradictory evidence and made a proper finding. It is our contention, however, that legal rights may not be denied or abridged by the Commission, and that the Commission, having made certain findings, that those findings are to be considered in connection with applicable law, and whether or not the Commission acted without evidence or heard all character of testimony does not change the situation and the proposition that we present. It is our contention that under the findings of the Commission it is admittedly acknowledged that applicable federal statutes which contain mandates to the Interstate Commerce Commission have not been followed, and that the Commission has refused and failed to follow these enactments. Therefore, the question as to whether or not the record before the Commission is before this Court is entirely immaterial.

We are contending that the Commission based its decision upon a mistake of law; that it refused to acknowledge the mandate of controlling federal statute, and, therefore, that it is invalid. We further contend that while the orders of the Commission are in form within its delegated power, yet the exercise of that power has been manifested in such an unreasonable manner as to cause it in truth to be within the elementary rule that the substance and

not the shadow determines the validity of the exercise of the power (**Interstate Commerce Commission v. Union Pacific R. Co.**, 220 U. S. 540, 547; **Interstate Commerce Commission v. Illinois Central R. Co.**, 215 U. S. 452, 470).

The report and orders of the Commission, while within the pretended scope of its administrative duty, nevertheless admit that they violate the mandate of federal enactment and that the Commission arbitrarily asserted authority contrary to existing and applicable law. Of necessity, where discretion is conferred, this authority does not imply the right to abuse said discretion, and courts of equity carry as a necessary incident to their powers the right to command and require that the limitation of sound discretion be not transcended; which, by necessary implication, carries with it the existence of judicial power to correct wrongs done by such excess (**Intermountain Rate Cases**, 234 U. S. 476).

If we correctly interpret the real contention of appellees in this proceeding, it is that when Congress passed the Interstate Commerce Act that it gave to the Interstate Commerce Commission free rein to determine matters alone under and by virtue of that enactment, and that any subsequent statutes which are lawfully enacted by Congress are not to have any force or effect to change or modify the particular delegated power given by the Interstate Commerce Act and that, therefore, Section 500 of the Transportation Act is not a controlling mandate which is bind-

ing upon the Interstate Commerce Commission; nor the other federal enactments to which we have referred. We respectfully suggest that this is not the law.

Orders of the Interstate Commerce Commission which admittedly violate such enactments, we contend, are unlawful. We contend that the orders of the Interstate Commerce Commission in its I. & S. Docket 3814 are invalid.

Respectfully submitted,

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Attorneys for Appellant.

APPENDIX A.

(2) In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical and efficient management, to provide such service.

(Act February 28, 1920, amended June 16, 1933.)